IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2020] EWHC 452 (Admin)

No. CO/4000/2019

Royal Courts of Justice

Tuesday, 18 February 2020

Before:

LORD JUSTICE FULFORD
MRS JUSTICE CARR DBE

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
IQBAL — Applicant

- and -

THE CROWN COURT AT CANTERBURY — Respondent

- and -

THE DIRECTOR OF PUBLIC
PROSECUTIONS — Interested Party

REPORTING RESTRICTIONS APPLY:
SECTION 4(2) OF THE CONTEMPT OF COURT ACT 1981

MS K. LUMSDON QC (instructed by Grey & Co) appeared on behalf of the Applicant.
THE RESPONDENT did not appear and was not represented.
MS V. AILES (instructed by the CPS) appeared on behalf of the Interested Party.

J U D G M E N T

MRS JUSTICE CARR DBE:

Introduction

1 This judicial review claim arises out of the refusal of bail to the Claimant pending his trial at Canterbury Crown Court for Class A drug importation. Following his arrest, the Claimant had been "released under investigation" by the police pursuant to s.30A of the Police and Criminal Evidence Act 1984 (as amended by the Policing and Crime Act 2017) for some two years. He was then charged by postal requisition and attended the Magistrates' Court where he was remanded in custody. The Claimant challenged that remand on 29 September 2019 before HHJ Brown ("the Judge"), who maintained the decision to remand the Claimant in custody ("the bail decision"). The Claimant contends that the bail decision was irrational. The Director of Public Prosecutions ("the DPP") appears as an interested party.

2 A reporting restriction was imposed pursuant to s. 4(2) of the Contempt of Court Act 1981 at the outset of this hearing. Publication of any aspect of this hearing and this judgment will be postponed until the conclusion of the (imminent) criminal proceedings. This restriction is necessary to avoid a substantial risk of prejudice to the administration of justice in those proceedings.

3 I express my gratitude at the outset for the able representations on both sides: from Ms Lumsdon QC for the Claimant, and from Ms Ailes for the DPP.

The facts

4 The Claimant is 33 years of age and married with two children, aged six and fourteen, with the family home in Liverpool. He is of previous good character.

5 He was stopped on 11 September 2017 in a UK control zone at Calais as the sole driver and occupant of a Subaru vehicle. He told Border Force officers that he had been out of the country for a day and a half, having travelled out the day before. He said that he had gone to Nürburgring, a motor sports complex in Germany, with friends who were already there. It was his first time visiting Nürburgring and out of the UK. He stated that he had stayed in a B&B but had no receipts. He said his friends had booked everything. He had owned the vehicle for three weeks, having purchased it specifically for this trip. He was returning home to Liverpool. He said that he traded cars for work from home. He said that he was going to keep this car. He just had some tools in the boot of the car in case of breakdown.

6 The vehicle was then searched. 14 kilograms of cocaine, with a street value of approximately £1,150,000, were found to have been concealed in the external compartments of the car bumpers. The Claimant was arrested. He said that he had not thought that there was anything in the vehicle and had no knowledge of the drugs. He was then formally interviewed under caution the next day and gave a prepared statement. He said that he had no idea how the drugs came to be in the vehicle, which he had bought about three weeks ago from a private seller in Manchester. When he purchased it there were a couple of boxes in the boot which he did not check through. He went to Germany to watch DTH racing with friends. The vehicle was not within his sight the whole time.

7 As indicated, the Claimant was then "released under investigation" without bail. He attended for voluntary interview on 16 April 2019, when the police put to him the product of some of their investigations – suggesting that he had not, in fact, travelled to Germany as he had alleged, for example. The Claimant made no comment, save to give responses to questions about his passport which had, by then, been cancelled.

8 On 16 August 2019, he received a postal requisition at his home informing him that he was charged with an offence of drug importation and requiring him to attend Folkestone Magistrates' Court on 18 September 2019 to answer the charge.

9 The Claimant duly attended on 18 September 2019. The CPS on that occasion objected to bail and the Claimant was remanded in custody by DJ Barron. The matter was then sent to the Crown Court for a plea and directions hearing on 20 September 2019. A "judge in chambers" application was then made on that day before the Judge. A surety of £15,000 was offered on behalf of the Claimant.

10 A detailed hearing took place, with counsel for both sides appearing before the Judge. At the conclusion of the hearing, the Judge gave a ruling in which she refused bail, a transcript of which is available. The Judge set out the nature of the charge facing the Claimant and a summary of the prosecution evidence updated, as it had been, for the Judge and as presented to her. She stated that the case against the Claimant was "extremely strong" and "extremely serious". His account was "implausible". Were the Claimant to be convicted, he would receive a very substantial sentence. She stated in terms that she took into account the fact that the Claimant was of good character with family in Liverpool, and went on:

> "… [The Claimant] is a man who... quite inexplicably in many ways, has been released under investigation for many months before he was re-interviewed, where he gave no comment and was subsequently charged. It's right to say that he has attended... the voluntary interview and... he appears at the magistrate's court. But I am quite satisfied, as was the District Judge, that there was a very real and substantial risk of this man failing to surrender if I were to grant him bail, and that risk is not met by any of the proposed conditions, even if I add to it not applying for any travel documentation. So this application for bail is refused."

The procedural position

11 The Claimant lodged an urgent application for judicial review on 11 October 2019. On 14 October 2019, permission to apply for judicial review was refused on the papers but, following an oral renewal hearing on 10 December 2019, permission was granted.

12 A PTPH in the criminal proceedings took place on 21 October 2019 at which the Claimant entered a not guilty plea. His trial is now fixed to take place on 24 February 2020, that is to say next Monday.

13 It is common ground that this Court has jurisdiction, since the bail decision does not fall within the exclusion under s.29(3) of the Senior Courts Act 1981 in respect of "matters relating to trial on indictment".

PACE 1984 and the Bail Act 1978

14 By s.30A of the Police and Criminal Evidence Act 1984, as amended by the Policing and Crime Act 2017, the criterion for release under investigation is that the police do not consider it "necessary and proportionate" to release on bail "… in all the circumstances, (having regard in particular to any conditions of bail which would be imposed)…"

15 Section 4 of the Bail Act 1978 provides: "A person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act." Paragraph 2 of Part I of Schedule 1 to the Act ("Schedule 1") provides materially as follows:

"1. The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would—

(a) fail to surrender to custody..."

16 Paragraph 9 of Part I of Schedule 1 provides:

"In taking the decisions required by paragraph 2(1)... the court shall have regard to such of the following considerations as appear to it to be relevant, that is to say—

(a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it),

(b) the character, antecedents, associations and community ties of the defendant,

(c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings,

(d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted,

(e) if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not), would commit an offence while on bail, the risk that the defendant may do so by engaging in conduct that would, or would be likely to, cause physical or mental injury to any person other than the defendant as well as to any others which appear to be relevant."

17 S.5(3) of the Bail Act 1976 provides:

"Where a magistrates' court or the Crown Court—

(a) withholds bail in criminal proceedings...

and does so in relation to a person to whom section 4 of this Act applies, then the court shall give reasons for withholding bail or for imposing or varying the conditions."

The Claimant's case

18 The Claimant refers at the outset to the presumption in favour of bail under s.4 of the Bail Act. By reference to the considerations identified in Schedule 1, Part I at para.9:

i. this was a serious offence, carrying a substantial sentence;

ii. the Claimant was a man of good character with strong family ties and a settled home in Liverpool;

iii. the Claimant had had no previous contact with the police, and so no bail record;

iv. the evidence against the Claimant was strong and it was suggested that his defence was implausible.

19 By the time of the hearing before the Judge, it was submitted for the Claimant that the position he faced was essentially the same as it always had been – save that the Claimant had kept in touch with the police since his arrest, attended for voluntary interview in Kent, and at Folkestone Magistrates' Court in response to a postal requisition.

20 The Judge, it is then submitted:

i. failed to acknowledge the right to bail;
ii. failed to explain why she rejected the evidence that – notwithstanding the Claimant's knowledge of the seriousness and strength of the case against him – he had attended on the police and at court when requested, in favour of the findings that there was a very real and substantial risk of the Claimant failing to surrender if granted bail;
iii. appeared to question the police decision to release the Claimant under investigation in 2017 and thereafter.

21 It is the second of these complaints that lies at the heart of the Claimant's case. What is said is that the Judge weighed his attendance and compliance in the balance, but simply dismissed it without giving any proper reasons for doing so.

22 Reference is made to *R (on the application of Rojas) v Snaresbrook Crown Court* [2011] EWHC 3569 (Admin) ("*Rojas*") (at [21]), where the statutory duty to give reasons for removing bail which had previously been granted was emphasised Whilst it is accepted that this is not a case where bail was being removed, it is suggested that the same principles apply, by analogy, to a situation where someone has previously been released under investigation.

23 In *R (on the application of Fergus) v Southampton Crown Court* [2008] EWHC 3273 ("*Fergus*") Silber J (at [20] and [21) referred to the critical test that for custody to be imposed, custody had to be necessary. He confirmed that any reason justifying the decision to withdraw bail had to be stated by the decision maker, and that such reason must relate to the facts:

> "…The underlying facts have to be put forward.."

24 The Claimant submits further that the duty to give reasons when withdrawing bail, and by analogy here, encompasses a duty to explain why a change from previous status is necessary. The integrity of the system, it is said, is compromised if judges overturn previous decisions without good reason. Anecdotally, Ms Lumsdon informed the Court that defence solicitors advise their clients as a matter of course that, absent a material change of circumstances and provided that the client has complied with attendance requirements on the police and the courts, the courts will effectively honour the previous police decision.

The DPP's case

24 The DPP submits that the bail decision was rational, and indeed right, on the merits by any standard of review, for the reasons given by the Judge. The fact that the Claimant attended court in answer to a postal requisition is by no means determinative. Any proposition that defendants can be advised that there will be any expectation of the status quo on bail being

maintained when their matter comes before the courts in any circumstances would be a dangerous one.

25 As for the duty to give reasons, Ms Ailes draws attention to the comments in *Rojas* at [21]. There it was said that the reasons referred to or required by s.5(3) of the Bail Act 1978:

> "... had to extend to a minimum reasonable level of adequacy, and had to identify the ground or grounds upon which the court was satisfied that bail should now be refused, and with a minimum level of adequacy identify the case specific reasons for being so satisfied."

26 Here, the DPP submits that the Judge's ruling more than satisfied those minimum reasonable requirements. The reasons given were specific and non-generic; they enabled – as today's hearing has demonstrated – the Claimant to challenge the substance of the Judge's reasoning.

Analysis: legal framework

26 Until April 2004, the High Court exercised a general inherent power (usually exercised by a judge in chambers) to grant bail to a person denied bail in the Magistrates' Court or the Crown Court. This power was abolished by s.17 of the Criminal Justice Act 2003. Since then, the only route of challenge is through judicial review (see s.17(6)(b) of the Criminal Justice Act 2003).

27 The Court has warned that that it will exercise this jurisdiction only sparingly: see, in particular, the comments in *R (on the application of M) v Isleworth Crown Court* [2005] EWHC 363 (Admin) ("*M*") where Maurice Kay LJ stated:

> "11. Although we have jurisdiction by reason of section 17(6)(b), I am in no doubt that it is a jurisdiction which we should exercise very sparingly indeed. It would be ironic and retrograde if, having abolished a relatively short and simple remedy on the basis that it amounted to wasteful duplication, Parliament has, by a side wind, created a more protracted and expensive remedy of common application.
>
> 12. Mr Montgomery, on behalf of M, recognises this in his submissions when he says that judicial review is appropriate only in a rare case where a judge in the Crown Court has plainly gone wrong in an extreme way. I do not feel able to adopt that as the test. The test must be on *Wednesbury* principles, but robustly applied and with this court always keeping in mind that Parliament has understandably vested the decision in judges in the Crown Court who have everyday experience of, and feel for, bail applications. Of course if bail were to be refused on a basis such as 'I always refuse in this type of case', or some other unjudicial basis, then this court would and should interfere."

28 In *R (on the application of Allwin) v Snaresbrook Crown Court* [2005] EWHC 342 (Admin) ("*Allwin*"), Collins J decided the matter by reference to the question of whether the decision was one which was in the bounds of what could regarded, by this Court, as reasonable.

29 Article 5 of the European Convention on Human Rights provides, materially, as follows:

> "Right to liberty and security: 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:... (c) the lawful arrest or detention of

> a person affected... when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so..."

30 In my judgment, Article 5 does not add anything to the consideration of this particular question. Very shortly after *Allwin*, in April 2005, Collins J restated the position expressly in the context of Article 5 in *R (on the application of Wiggins) v Harrow Crown Court* [2005] EWHC 882 (Admin) ("*Wiggins*"). At [35] to [37] he rejected the proposition that there should be a more intensive review in bail cases engaging fundamental rights:

> "35... The Crown Court judge constitutes, for the purposes of Article 5... the independent court which has to decide the issue. The Convention does not require any right of appeal from that independent court. This is not a strict appeal. It is a judicial review, so there is, in my judgment, no reason why the approach of this court should be other than a strict review approach....
>
> 37. [A more intensive review] would undoubtedly be the right approach if this were a decision of a review court dealing with an administrative decision against which there was no appeal. However we are not dealing with an administrative decision, but we are dealing with the decision of a judge."

31 The approach in *Wiggins* was expressly adopted in *R (on the application of N) v Leeds Crown Court* [2005] EWHC 3352 (Admin) in December of the same year, where there is a useful summary of the relevant principles to be found, in particular at [13] to [17].

32 In October 2005, in *R (on the application of Thompson) v Central Criminal Court* [2005] EWHC 2345 (Admin), Collins J dealt with *Wednesbury* reasonableness and proportionality in the context of Article 5:

> "3. Mr Bowen has submitted that since we are concerned here with rights under Article 5 of the European Convention on Human Rights, the test ought to be one of proportionality rather than the usual *Wednesbury* test. But, as seems to me, in this context what this court has to decide, this being a review and not an independent appeal, is whether the decision made by the judge below proportionate. It will be proportionate if it lay within the bounds of what was reasonable in deciding what was proportionate. Hence, the test is, appropriately, the *Wednesbury* test when it comes to this court."

33 As to the overall approach, Collins J described it thus:

> "10. The approach under the Bail Act is entirely consistent with the approach that the European Court has regarded as proper under Article 5, namely that there must be a grant of bail unless there are good reasons to refuse. The approach, therefore, really is not should bail be granted, but should custody be imposed, that is: is it necessary for the defendant to be in custody? That is the approach the court should take. Only if persuaded that it is necessary, should a remand in custody take place. It will be necessary if the court decides that whatever conditions can reasonably be imposed in relation to bail, there are nonetheless substantial grounds for believing that the defendant would either fail to surrender to custody, commit an offence, interfere with witnesses or otherwise obstruct justice."

The test of necessity was repeated by Silber J in *Fergus* at [20].

34 The Claimant has referred to the earlier authority of *R (on the application of Gibson) v Winchester Crown Court* [2004] EWHC 361 (Admin), [2004] 2 Cr App Rep 14 (*"Gibson"*). This was a case concerning the extension of custody time limits and decided before the introduction of s.17 of the Criminal Justice Act 2003 (and thus before the abolition of the Court's inherent power to grant bail to a person denied bail in the Magistrates' or Crown Court). There, Lord Woolf CJ stated:

> "38. The third issue to which I should refer is that which deals with intensity of review. Mr Perry drew attention to the fact that in his submissions he had not relied on the *Wednesbury* principle. In my judgment it was correct that he should adopt that approach. This case involves the human rights of the claimants. In those circumstances it is only right that the court which originally considers the question of granting an extension should look at the matter with particular care, as the authorities indicate. Equally, when the matter comes before us, we must scrutinise it rigorously, but at the same time recognising that the decision is for the judge in the court below to make. Unless we come to the conclusion that he has wrongly exercised his discretion we will not interfere."

35 *Gibson* was not an authority referred to in any of the cases decided in 2005 to which I have referred; and, as indicated, it predated the introduction of s.17 of the Criminal Justice Act 2003. Perhaps even more materially, it addressed a different section of Article 5 engaging a different test in relation to custody time limits (Article 5(3)) as opposed to Article 5(1)(c) which is engaged here.

36 All that aside, in practice, it seems to me that there is unlikely to be any material distinction in outcome, whichever approach is adopted. In *Gibson*, the Court will only interfere if the judge wrongly exercised his discretion; and in *Thompson*, the Court will only interfere if the decision was not within the bounds of what is reasonable. What is required is the robust application of *Wednesbury* principles. Insofar as there is any material difference in cases relating to the granting or the withholding of bail, the well-established line of reasoning in the later authorities – commencing with the Divisional Court decision in *M* in 2005 – is to be preferred.

Applying the legal background to the facts

37 Against this background, we turned to the Judge's ruling. The basis of her decision to refuse bail was:

i. the nature and seriousness of the offence, and the probable method of dealing with the Claimant for it; and

ii. the strength of the case against the Claimant.

Thus she considered considerations (a) and (d) of para.9 of Part I of Schedule 1 to be in play.

39 It can be taken that this experienced judge was well aware of the right to bail. She was clearly entitled to take into account the seriousness of the offence and the severity of likely penalty. Whilst these factors are not, of themselves, determinative of the question whether custody is necessary (see *Hurnam v State of Mauritius* [2006] 1 WLR 857 per Bingham LJ at [15]), they are highly relevant on the (striking) facts of this case. Equally, the strength of the case against the Claimant was clearly material; no criticism is made of the Judge's assessment of the merits as "extremely strong".

38 The essence of the claim is that the Judge failed to give adequate reasons for finding that there were substantial grounds for believing that the Claimant would fail surrender to custody in circumstances where the Claimant had at all times previously cooperated and attended court at all times as required, including after charge. For the Claimant, it is said that the Judge ought to have, but failed, to explain why there should be a change in his custody status; alternatively, that the Judge should not simply have disregarded his previous cooperation in such circumstances without explanation.

39 I am not persuaded that the Judge's decision was irrational in any way, or that she failed to give adequate reasons for the purpose of s.5(3) of the Bail Act 1978. The decision itself was well within the bounds of reasonableness and cannot be said to have involved the wrong exercise of discretion. As for reasons, the Judge's analysis was tailor-made, clear, and reasoned – far from the situation in *Rojas* for example, where the Judge had simply stated that a custodial sentence was inevitable and the defendant would be remanded in custody.

40 This is not a case where the Judge had to proceed on the basis that she was considering whether or not a change of custody status was justified – rather her task was to consider, by reference to the relevant legislative framework, whether or not it was necessary to impose custody at that stage. It is difficult to see what more she could have said. She stated, in terms, that she had well-in-mind the fact that the Claimant had complied, including after charge, with requirements to attend. She expressly did not disregard that factor.

41 However, she was nevertheless entitled to conclude on the situation before her that custody was necessary on the basis given: namely, that the seriousness of the offence; the severity of the penalty; and the strength of the case meant that there were substantial grounds for believing that, if the Claimant was released, he would fail surrender. Even at the time of his arrest and first interview, his defence was implausible. On his own case, he had only been out of the country for a day and a half – the distance from Calais to the Nürburgring by road is approximately 300 miles. The sophisticated manner of the drugs' packaging and concealment, involving lead-lining and an integrated cooling-system, would have required access to the vehicle for a significant period of time. The suggestion that drugs to the value in question would be left with the Claimant without his knowledge appears doubtful.

42 By the time of the hearing before the Judge, the Claimant's position on the basis of what the Judge was told had materially weakened although, as she was told, there was no fingerprint evidence linking him to the wrapping of the drugs. His suggested defence, as presented in his answers when stopped, and his prepared statement had by now been fully investigated and, on the prosecution case, shown to be false. By way of example, the prosecution's position was the telephone evidence showed him moving through France, Belgium and the Netherlands – but not into Germany. He had stayed at a hotel, but not one located in Nürburgring, but possibly in Venlo on the Dutch border. There was no record of his vehicle at the Nürburgring or of him being a car-trader.

43 Moreover, the prosecution papers had only just been served on the Claimant's advisors on 17 September 2019. As his solicitors had previously made clear, only armed with those papers would they be able to advise the Claimant on the full-strength of the case against him. The Claimant faced (and faces) a very lengthy sentence in the event of conviction. It is to be noted that the highest bracket in the Sentencing Council guideline for importation of a Class A drug uses an indicative quantity of only 5 kilograms, with the starting point of 14 years' custody for a person playing a leading role. Here, the quantity involved was almost three times that quantity.

44 I do not accept in any way – and, ultimately, Ms Lumsdon did not go this far – that the Judge was, in any way, bound by the police decision to release the Claimant under investigation. Any suggestion that there is some sort of presumption that, whenever a defendant is released under investigation and then complies with all requirements, the court will subsequently grant bail is misplaced. The decision on bail, when a defendant is brought to court, falls to be made afresh and independently on the up-to-date facts of each case. It is not a question of "overturning" a previous police decision on bail. Just as it would not be a ground for opposing bail that a police officer believes it should be refused, so it is not a ground for granting bail that a police officer believes that it should be allowed.

45 As referred to in paragraph 23 above, the Court was told that defence solicitors currently advise their clients that, if they are released under investigation and then receive a postal requisition, they will not be remanded in custody if they comply (and have in the past complied) with all attendance requirements, absent a material change in circumstances. If this is indeed a practice, there is no proper or principled basis for it. The full history and background will be taken into account by a court, as was the case here, but there can never be any guarantee of bail once a defendant is charged.

46 For these reasons, I would dismiss the claim.

LORD JUSTICE FULFORD: I agree.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

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